IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 486

JOS. SCHLITZ BREWING COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA

and

GENERAL BREWING COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

PETITION FOR REHEARING

By summarily denying* Jos. Schlitz Brewing Company any plenary review of a harsh decree of divestiture entered by a single district judge and thereby leaving unanswered the substantial questions presented for review, this Court has clouded important and controversial aspects of anti-trust enforcement:

(1) Does Section 7 of the Clayton Act sanction a decision that prevents an American firm from entering a foreign market in the only way open to it, as Schlitz did here by acquiring control of John Labatt Limited, a Canadian brewer. (2) Are the purposes of the statute furthered by the outlawing of Schlitz's effort to extend its competition to a foreign market, simply because Labatt controlled General Brewing Corporation, a rapidly fading American brewer which Schlitz would not have retained or controlled.

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* 385 U.S. 37 (Nov. 7, 1966).

(3) Can unconditional divestiture of the Labatt shares by Schlitz possibly repair any actual or threatened injury to competition discerned by the district court, inasmuch as the acquisition was adjudged unlawful only because Labatt controlled General Brewing and particularly since General Brewing would demonstrably benefit by the undoing of its ties with Labatt.

The resolution of these issues by the district court lacks any visible means of factual support in the record. Above all, we cannot believe that the legal issues engendered by the decision below are so insubstantial as not to deserve a hearing on the merits, especially since the Expediting Act gives Schlitz a right of appeal to this Court.

Indeed, the collision of Section 7, as enforced below, with the effort of an American firm to pry open a foreign market traditionally closed to outside competition cries out for review here.* This is, moreover, the first opportunity for the Court to reconcile with the broader purposes of the antitrust laws what is at best an overly technical and rigid application of Section 7 to a foreign acquisition and to do so at a time of rising American investment abroad.** At least the issues should be thoroughly explored before this Court's imprimatur is placed on such a far-reaching decision by a single district judge.

Equally significant and deserving of plenary review are the issues respecting Schlitz's purchase of the Burger-

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* Not one American brewer markets in Canada, and not one barrel of American beer has been exported to Canada since 1958 and only 1,261 barrels have been exported since 1950. If trade barriers did not exist, American brewers could ship profitably to population centers in Canada, and many of them have long been plagued with excess capacity.

** Compare *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951), which left unresolved parallel issues arising under Section 1 of the Sherman Act.

meister Brewing Corporation, a California brewer. The head of the Antitrust Division has, in effect, confirmed that the acquisition was "cleared" before it was consummated by Schlitz in 1961. (See Juris. St. p. 15) Furthermore, stipulations between the parties document Burgermeister's severe decline in the years immediately preceding the acquisition, a fact known to the Antitrust Division when it decided not to take any adverse action in 1961. Yet the decision below and the government's motion to affirm were predicated heavily on the contrary assumptions. Pre-merger clearance and declining market share are still controversial aspects of Section 7 enforcement; their significance under the statute should not be obscured by a summary affirmance that neither explores the issues nor explains the result.

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We respectfully submit that sound judicial administration and elemental fairness warrant the grant of this petition for rehearing.

Respectfully submitted,

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December 2, 1966

CERTIFICATE UNDER RULE 58

I, Joseph DuCoeur, one of the attorneys for appellant and a member of the Bar of this Court, certify that this petition for rehearing is presented in good faith and not for delay.

/s/

December 2, 1966